Department of Defense

National Security Personnel System

Labor and Employee Relations in the NSPS Environment

Tim Curry

Debra Buford

Carolyn Howell

March 2009

Overview

- NSPS Today
- Labor Relations Update
- Managing Performance
- Adverse Actions Issues
- Challenges to NSPS Performance Ratings – Reconsideration Process
- Equal Employment Opportunity Issues
- Alternative Dispute Resolution

NSPS Today - What Does Not Change?

- Merit System Principles
- Veterans' Preference
- Whistleblower protection
- Rules against prohibited personnel practices
- Anti-discrimination laws
- Collective bargaining rights
- Fundamental due process
- Benefits (retirement, health, life, etc.)
- Allowances and travel/subsistence expenses
- Training
- No pay loss upon conversion

NSPS Today – Government-wide rules

- NSPS employees fall under government-wide rules for:
  - Labor-Management Relations (5 USC chapter 71)
  - Adverse Actions and Appeals (5 USC chapters 75 and 77)
  - Reduction-in-Force (5 USC chapter 35)
- Same procedures & same standards as GS and FWS employees, but different HR rules!
- Revised NSPS regulations effective November 25, 2008 are treated like government-wide regulations for collective bargaining purposes

Sixteen Bargaining Units Under NSPS

- All organized AFTER conversion to NSPS
  - 8 Army bargaining units (185 employees)
  - 1 Air Force bargaining unit (42 employees)
  - 1 DLA bargaining unit (26 employees)
  - 1 DISA bargaining unit (3 employees)
  - 5 Navy bargaining units (66 employees)
- Currently, 322 NSPS employees covered by above units
- 8 bargaining units are pre-existing units – added NSPS employees to units with GS and FWS employees
  - Most have collective bargaining agreements (CBA) in place
  - In some cases, CBAs conflict with some NSPS policies

Union Organizing - Overall

- 52 new bargaining units formed across DoD since 2006
- 15 existing bargaining units have added additional positions to unit coverage since 2006
- Addition of 5,106 new bargaining unit positions
- At least 23 union elections or petitions for elections currently pending before the Federal Labor Relations Authority

Managing Performance

- Communicate performance expectations
- Observe and document performance
- Provide on-going feedback
- Evaluate performance
- Address performance that does not meet expectations

Origins of Poor Performers

- Employee came as a poor performer
- Employee developed a poor attitude or work habits
- Employee and job are not compatible
- Employee has health problems
- Employee's position or job assignment has changed

Performance Interventions

- Give supervisory feedback
- Provide remedial training
- Change work assignment
- Assign mentor or advisor
- Provide improvement period
- Take appropriate action

Types of Actions and Penalty Selection

- **Not Capable of Performing**
  (e.g. failure to perform accurate engineering analysis)
  - Remedial Actions: coaching, letter of counseling, training, mentoring, improvement period, reassignment
  - Adverse Actions: change to lower pay band, removal (logically involves movement out of the position)

- **Willful or Negligent Non-performance or Failure to Perform**
  (e.g. failure to work harmoniously with customers)
  - Remedial Actions: verbal warning, letter of counseling, oral admonishment.
  - Adverse Actions: Written reprimand, suspension to removal (full range of penalties open and may be effective)

Chapter 75 Requirements

Notice of Proposed Action

↓

Employee's answer to notice

↓

Right to representation

↓

Decision issued

↓

Notice of right to appeal

Adverse Action Issues – Retained Pay

- Retained pay may be offered for a period of 104 weeks per NSPS regulations (5 CFR 9901.356)
  - Pay retention prevents reduction in base salary when employee's salary exceeds maximum rate of pay band which they are placed for various reasons such as:
    - ✓ Reduction in force or reclassification
    - ✓ Priority Placement Program
    - ✓ Reassignment
- At end of 104 weeks, base salary is reduced to no more than maximum rate of pay band
- If actual salary loss occurs, employees may view a reduction-in-pay as an adverse action and challenge to the Merit Systems Protection Board

Adverse Action Issues – Retained Pay

- Retained pay flexibility should be used with caution
- Adverse action challenges can be mitigated if:
  - Management makes effort to place employee within their existing pay band; or
  - Management makes effort to place employee in a comparable band with a rate range that can absorb the employee's salary
- Retained pay cannot be provided if management wishes to reassign employees to comparable bands for performance or misconduct reasons
  - Performance or misconduct issues should be addressed from those perspectives – address the performance or misconduct using normal procedures, not reassignments

Adverse Action Issues

- Reassignment with involuntary reduction in pay
  - NSPS provides flexibility to reassign employees with involuntary pay reductions for unacceptable performance and/or conduct
  - Reassignments can occur within the same pay band or to a different but “comparable” pay band
  - Adverse action?
    - ✓ **Yes.** Involuntary reductions in pay are adverse actions.
    - ✓ Comply with 5 USC chapter 75 and 5 CFR part 752.

Reconsideration Process

- What is the Reconsideration Process?
  - The exclusive administrative means for non-bargaining unit employees to challenge matters related to performance
    - ✓ Overall rating of record
    - ✓ Individual job objective ratings
- It is simply a version of an agency administrative grievance process but deals exclusively with NSPS performance matters
- It is handled in the same manner as any other agency administrative grievance, but within the requirements outlined in the regulation and implementing issuance

Reconsideration Process

- What it is not—exclusions
  - Share determination (number and value)
  - Payout (base pay/bonus distribution)
  - Interim review
  - Recommended rating
  - Closeout assessment
  - EEO matters
- These matters may not be challenged in the normal agency administrative grievance process…statutory processes are another matter…..

Reconsideration Process

Employee Must:

10 Days to request review

Request reconsideration of Rating of Record or individual job

Request may include:
- selection of a rep
- request for discussion with PPM and/or Pay Pool Panel

Pay Pool Mgr (PPM) Must:

Consider/approve selection of rep, if any

Consider any request to confer with PPM or Pay Pool Panel

Consider request, confer with Rater, may inquire further, and make decision

15 Days to decide

Performance Review Authority (PRA) or Designee Must:

Review request, confer with PPM, may inquire further

15 Days to decide

PRA DECISION IS FINAL

If satisfied with PPM decision, process ends; if not satisfied or decision not provided within time limit, may request PRA final review

5 Days to request PRA final review

NOTE: 15-day time limit on PPM and PRA decisions may be extended by 15 days with notification to employee.

EEO Considerations

- NSPS did not change EEO requirements or procedures – government-wide rules apply
- Under NSPS there is increased discretion in decisions formerly limited by law or regulation
- Decision makers need to have business based reasons for taking action – in EEO speak, legitimate nondiscriminatory basis for taking the action

EEO Considerations

- What are the likely issues?
  - Performance rating
  - Share determination
  - Split between continuing pay and bonus
  - Selection for reassignment
  - Pay increase with reassignment
- Some (but not all) strategies to address issues
  - Performance rating
    - ✓ Ensure rating is consistent with Performance Indicators
  - Share determination and Split between salary and bonus
    - ✓ Have consistent, business-based approach to determining number of shares and allocation
    - ✓ Communicate the decision to employees as part of publication of pay pool business rules
  - Selection for Reassignment
    - ✓ Have legitimate nondiscriminatory reasons for selection
    - ✓ May use competition, even though not required
  - Determination of Pay Increase upon Reassignment
    - ✓ Use Pay setting guidelines as appropriate
    - ✓ Be consistent with similarly situated employees

Alternative Dispute Resolution

"Any procedure that the parties agree to use, instead of formal adjudication, to resolve issues in controversy, including, but not limited to settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration or any combination thereof."

DoD Directive

ADR Spectrum*

* From Costantino, C. and Merchant, C., Designing Conflict Management Systems, Jossey-Bass Inc., Publishers (October, 1995).

Alternative Dispute Resolution

- Overall DoD ADR policy by DoD Directive 5145.5
  - "Each DoD Component shall establish and implement ADR policies and programs."
  - "All DoD Components shall use ADR techniques as an alternative to litigation or formal administrative proceedings whenever appropriate."
  - "Every dispute, regardless of subject matter, is a potential candidate for ADR."
- NSPS regulation (5 CFR 9901.413) provides that ADR may be pursued at any time during the reconsideration process consistent with the Component's policies and procedures
- NSPS regulation does not limit when ADR may be pursued – limits determined by Component policies and procedures (if any)

QUESTIONS?

- NSPS Today
- Labor Relations Update
- Managing Performance
- Adverse Actions Issues
- Challenges to NSPS Performance Ratings – Reconsideration Process
- Equal Employment Opportunity Issues
- Alternative Dispute Resolution

Backup Slides

Union Activity

- Union organizing efforts targeting eligible employees not represented by unions
  - Organizing efforts have spiked, particularly in organizations covered by NSPS
  - Organizing efforts across all Components
- Union organizing efforts have impacted NSPS implementation for some organizations
  - NSPS limited to non-bargaining unit employees
  - Organizing efforts raising questions on employee status – bargaining unit or non-bargaining unit?

Some Helpful Tips

- Management Conduct During Union Organizing Activities

Remain neutral:

- Don’t coerce or attempt to influence an employee’s choice
- Don’t take actions based on union organizing activity (reprisal)
- Don’t discuss if unions are beneficial or not
- Don’t promise a benefit to employees based on a desired behavior regarding election outcomes
- Don’t interfere with an election

Some Helpful Tips

- What can you do?
  - Inform employees of an election
  - Encourage employees to vote
  - Rebut false or misleading statements
  - Enforce all workplace rules
  - Prohibit organizing activity in work areas during work hours
  - Refer employee union-related questions to Human Resources Offices, FLRA, and Union
  - Consult with your Labor Relations advisor in your servicing Human Resources Office

System Element Comparison

System Element	Chapter 43	Chapter 75
Types of Actions	Demotion or Removal	Suspension, Demotion, or Removal
Actions Taken For	Unacceptable performance	“such cause as will promote the efficiency of the service”
Proof	Substantial evidence	Preponderance of the evidence

System Element Comparison

System Element	Chapter 43	Chapter 75
Actions Based On	Actions can only be based on an employee's formal, established, communicated standards	Actions can be based on expectations or established/ formal standards
Improvement Period	Required	Optional

System Element Comparison

System Element	Chapter 43	Chapter 75
Time Limits	Limited to performance “deficiencies” occurring within the 1 year prior to proposal notice	No time limit
Mitigation	Action may not be mitigated (action will either be sustained or reversed)	Action may be mitigated (penalty reduced)

Chapter 75 Considerations

- Special Circumstances
  - Non-disciplinary Adverse Actions
  - Employee Assistance Program
  - Reasonable Accommodation

Adverse Action Issues

- Unacceptable rating of record
  - Ineligible for pay increases of any kind
  - Some employees' salary may fall below the minimum rate of his or her assigned pay band
  - Adverse action?
    - ✓ **No.** Employee doesn't suffer any loss of pay nor has any management action been initiated to reduce pay or place employee in a lower pay band.
    - ✓ Employee's position and level of work remain within the assigned pay band
    - ✓ Even so, employee may view this as a constructive reduction in pay or pay band and challenge to MSPB.

Definitions:

- **Pay Pool Manager (PPM):** The individual designated to manage the pay pool, resolve discrepancies, and ensure consistency. (See 5 CFR 9901.103 for full definition)
- **Pay Pool Panel:** Management officials, including the PPM, of the organizations or functions represented in the pay pool that assist the PPM in the exercise of his/her responsibilities. (See 5 CFR 9901.103 for full definition)
- **Performance Review Authority (PRA):** One or more management officials who manage and oversee the operation of one or more pay pools and ensure procedural and funding consistency among pay pools under its authority.

Reconsideration Process

Challenging the Rating of Record

- **Written request for reconsideration must be submitted to Pay Pool Manager within 10 calendar days of receipt of rating**
  - ✓ Employee may identify representative
  - ✓ Request must include a copy of the rating, state what change is being requested and the basis for the change
  - ✓ Employee may request opportunity to personally address the Pay Pool Manager and/or Pay Pool Panel

- **Pay Pool Manager must render written decision within 15 calendar days**
  - ✓ Determine if request for communication will be accomplished
  - ✓ May confer w/rating official and/or conduct further inquiry
  - ✓ Decision must include brief explanation of the basis of the decision
  - ✓ Decision is final, unless employee seeks further reconsideration from the Performance Review Authority

Reconsideration Process

- **Employee's Dissatisfaction with Decision**
  - **Employee must submit written request for final review by the PRA or PRA designee within 5 calendar days**
  - **PRA or PRA designee must render written decision within 15 calendar days**
    - ✓ May confer w/Pay Pool Manager and/or conduct further inquiry
    - ✓ Decision of PRA or PRA designee is final

Grievance Procedures

- DoD Administrative Grievance System (AGS)
  - DoD 1400.25-M, Subchapter 771
  - AGS not available for challenging matters related to NSPS ratings or NSPS performance payouts
  - Reconsideration process is the ONLY forum available – intent was for unique procedure to address NSPS performance management matters….even so…..
    - ✓ Only the rating of record and individual job objective ratings may be challenged through the NSPS reconsideration process
    - ✓ No other matters related to NSPS ratings may be challenged through the reconsideration process or the AGS
- Negotiated Grievance Procedure (NGP)
  - 5 USC 7121
    - ✓ Locally negotiated, broad scope procedure
    - ✓ Included if not explicitly excluded
    - ✓ Binding arbitration
  - Fifteen bargaining units under NSPS – organizing continues

Negotiated Grievance Procedure

- Grievance remedy or arbitration award generally cannot conflict with NSPS regulation or implementing issuances
  - Regulation & implementing issuances govern disposition of matter grieved if regulation & issuances do not conflict with provisions of an applicable collective bargaining agreement
  - Arbitration award will be found deficient if it conflicts with an enforceable agency or government-wide rule or regulation

- Bargaining unit employees can potentially challenge NSPS matters not reviewable by administrative procedures available to non-bargaining unit employees – this is no different than any other Department policy outside of NSPS